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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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10 ODIS MANN BURNETT,
11 Plaintiff,
12 v.
13 UNITED STATES, et al.,
14 Defendant(s).
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Case No. EDCV 15-1707-CAS (KKx)

FINAL REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

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17 This Final Report and Recommendation is submitted to the Honorable
18 Christina A. Snyder, United States District Judge, pursuant to Title 28 of the
19 United States Code, section 636 and General Order 05-07 of the United States
20 District Court for the Central District of California.

21 **I.**

22 **SUMMARY OF RECOMMENDATION**

23 On July 1, 2016, Defendant United States (“Defendant”) filed a Motion for
24 Evidentiary Sanctions pursuant to Federal Rule of Civil Procedure 37(c)
25 (“Motion”) against Plaintiff Odis Mann Burnett (“Plaintiff”), seeking to (1)
26 preclude Plaintiff from introducing evidence of damages for (a) future medical
27 expenses and (b) loss of wages and future loss of earnings, and (2) limit intangible
28 damages to \$100,000 less any award for past medical expenses. ECF Docket No.

1 (“dkt.”) 22. Defendant’s Motion has been referred to the undersigned United
2 States Magistrate Judge for consideration. For the reasons discussed below, the
3 Court recommends DENYING Defendant’s Motion without prejudice.

4 II.

5 BACKGROUND

6 According to the Complaint, on August 26, 2014, Plaintiff was a passenger in
7 a vehicle, operated by a United States employee, Chad Emerson. Plaintiff alleges
8 he was injured when the vehicle collided with a curb and hit a block wall. Dkt. 1,
9 Compl.

10 On October 29, 2014, Plaintiff submitted an administrative claim for
11 damages arising out of the accident in the amount of “100,000>.” Dkt. 23-1,
12 Declaration of John W. Shaller in Support of Plaintiff’s Opposition to Motion
13 (“Shaller Decl.”), ¶ 3. The claim was not resolved at the administrative level. Id.

14 On August 24, 2015, Plaintiff filed a Complaint against Defendant pursuant
15 to the Federal Tort Claims Act (“FTCA”). Plaintiff alleges he suffered “great
16 physical, mental, and emotional pain” requiring the care and treatment of
17 hospitals, physicians, surgeons, and nurses. Compl. at ¶¶ 19, 21. Plaintiff further
18 alleges he incurred, and will necessarily incur, “other incidental expenses related to
19 the necessary care and treatment of such injuries . . . for an indefinite period of time
20 in the future” and he was, and will continue to be, “prevented from attending to
21 his usual occupation for an indefinite period of time in the future.” Id. at ¶¶ 21-23.

22 On March 7, 2016, Plaintiff served initial disclosures pursuant to Federal
23 Rule of Civil Procedure 26(a). Shaller Decl., ¶ 5. Regarding damages, Plaintiff
24 stated (a) “wage loss incurred to date, for which recovery will be sought, has not
25 yet been determined”; (b) “future damages relating to medical bills and wage loss
26 have not yet been determined”; and (c) intangible damages “will be sought in the
27 amount to be determined at the time of trial.” Id. Plaintiff did not provide any
28 figures regarding the amount of damages allegedly incurred and admits he provided

1 no documents “in support of an amount for future medical expenses, wage loss,
2 loss of future earnings, or intangible damages.” Id.; see also dkt. 20-1, Declaration
3 of Justin A. Okun in support of Defendant’s Motion to Compel, Ex. A, Initial
4 Disclosures.

5 On April 20, 2016, Plaintiff served responses to Interrogatories and Requests
6 for Production. Shaller Decl., ¶ 6.

7 On May 20, 2016, Plaintiff served supplemental initial disclosures and
8 informed Defendant’s counsel, “[T]he future medical damages were unknown, as
9 were the loss of future earnings for the Plaintiff. Plaintiff was only 19 years of age at
10 the time of the collision and had no work history.” Id. at ¶ 7.

11 On June 2, 2016, Defendant moved to compel supplemental initial
12 disclosures that included a computation of damages, supplemental responses to
13 interrogatories regarding computation of damages, and supplemental responses to
14 requests for production seeking documents regarding damages, medical imaging
15 such as X-rays and MRI’s, and medical and billing records. Dkt. 20. Plaintiff did
16 not oppose the motion to compel. On June 14, 2016, the Court granted
17 Defendant’s motion to compel in its entirety. Dkt. 21.

18 On June 24, 2016, pursuant to the Court’s June 14, 2016 Order, Plaintiff
19 served additional supplemental disclosures, supplemental Interrogatory responses,
20 and supplemental Request for Production responses. Dkt. 22-1, Declaration of
21 Justin A. Okun in Support of Defendant’s Motion (“Okun Decl.”), Ex. A, Suppl.
22 Rule 26 Disclosures; Ex. B, Suppl. Interrogatory Responses; Ex. C, Suppl. Request
23 for Production Responses. Regarding future medical expenses, Plaintiff states he
24 “believes that he will incur future medical expenses . . . in the form of future
25 surgeries, pain management and future physical therapy in the amount of
26 \$1,000,000.” Okun Decl., Ex. A. Regarding wage loss and future loss of earnings,
27 Plaintiff states: “As a result of the incident, Plaintiff has suffered economic
28 damages in the form of wage loss/loss of future earning capacity and will continue

1 to suffer said damages in the future. At present, Plaintiff Odis Burnett calculates
2 these damages as follows: \$1,000,000.” Id. Finally, regarding intangible damages,
3 Plaintiff states he “is seeking to recover general damages in the amount of
4 \$700,000.00 for his pain and suffering; physical disfigurement; physical
5 impairment; mental anguish; and lowered quality of life.” Id. In addition, Plaintiff
6 states he produced Plaintiff’s “complete medical and billing records in Plaintiff’s
7 possession, custody or control” that he may use to support his claims for damages
8 and “relating to all medical imaging, including X-rays, magnetic resonance imaging
9 (MRI), and computerized tomography scans performed on Plaintiff within the last
10 10 years.” Okun Decl., Ex. C.

11 On July 1, 2016, Defendant filed the instant Motion for evidentiary sanctions
12 pursuant to Federal Rule of Evidence 37(c), based on Plaintiff’s alleged failure to
13 comply with the initial disclosure and supplementation requirements of Federal
14 Rule of Civil Procedure 26, subsections (a) and (e). Dkt. 22. The Motion seeks to:
15 (1) preclude Plaintiff from introducing evidence of damages for (a) future medical
16 expenses and (b) loss of wages and future loss of earnings; and (2) limit intangible
17 damages to \$100,000 less any award for past medical expenses. Id. On July 12,
18 2016, Plaintiff filed an Opposition. Dkt. 23. On July 16, 2016, Defendant filed a
19 Reply. Dkt. 24.

20 On August 1, 2016, this Court issued a Report and Recommendation that
21 Defendant’s Motion to Compel be denied without prejudice. Dkt. 27. On August
22 11, 2016, Defendant filed an Objection to the original Report and Recommendation.
23 Dkt. 29. The Court addresses Defendant’s Objections in this Final Report and
24 Recommendation.

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28 **III.**

DISCUSSION

A. APPLICABLE LAW

Federal Rule of Civil Procedure 26(e) requires a party to supplement or correct an initial disclosure or discovery response “as ordered by the court.” Fed. R. Civ. P. 26(e)(1)(B). Pursuant to Federal Rule of Civil Procedure 37(c)(1), “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). This sanction is a “self-executing,” “automatic” sanction to “provide[] a strong inducement for disclosure of material” Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).

Nevertheless, Rule 37(c)(1)’s exclusion sanctions are not mandatory. Id.; see also Bonzani v. Shinseki, No. 2:11-CV-0007-EFB, 2014 WL 66529, at *3 (E.D. Cal. Jan. 8, 2014) (finding Rule 37(c)(1) exclusion sanctions are not mandatory, even when the insufficient disclosures are not substantially justified or harmless). A court’s decision to exclude evidence is discretionary and the court is given “particularly wide latitude . . . to issue sanctions under Rule 37(c)(1).” Id. “In exercising that discretion [] the court is also guided by the requirement that where imposing a Rule 37(c)(1) sanction amounts to dismissal of a claim, the court is required to consider whether noncompliance involved willfulness, fault, or bad faith, and also the availability of lesser sanctions.” Bonzani, 2014 WL 66529, at *3 (citing R & R Sails, Inc. v. Ins. Co. of Pennsylvania, 673 F.3d 1240, 1247 (9th Cir. 2012) (reversing district court grant of evidentiary sanctions excluding evidence of damages and remanding for consideration of willfulness, fault, or bad faith, and availability of lesser sanctions).

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B. ANALYSIS

1 The Court finds Defendant's Motion for Evidentiary Sanctions precluding
 2 entire categories of damages is premature. The cases Defendant relies on involve a
 3 plaintiff's failure to adequately disclose his theory and calculation of damages only
 4 after conclusion of expert discovery or on the eve of trial. See, e.g., Yeti, 259 F.3d
 5 at 1106 (excluding expert testimony of damages where expert report was delayed
 6 two and a half years and only produced one month before a trial in a complex case);
 7 Estate of Gonzalez v. Hickman, No. 05-00660-MMM (RCx), 2007 WL 3237635, at
 8 *4 (C.D. Cal. June 28, 2007) (motions *in limine* brought after summary judgment,
 9 after expert discovery, and just before trial); Am. Realty Trust, Inc. v. Matisse
 10 Partners, L.L.C., No. CIV.A.3:00-CV-1801-G, 2002 WL 1489543, at *1 (N.D. Tex.
 11 July 10, 2002) (motion to exclude evidence made during pre-trial conference,
 12 where entirely new theory of damages raised in supplemental disclosures for the
 13 first time two weeks after the close of discovery and two months before trial).
 14 Here, Plaintiff's supplemental disclosures were made prior to the fact discovery
 15 cut-off, before expert witness disclosures are due, and over seven months before
 16 trial. See dkt. 18. Defendant has not provided an analogous case that convinces
 17 this Court that the harsh sanction Defendant seeks would be appropriate under the
 18 particular circumstances of this case.

19 Second, Plaintiff's disclosures are sufficiently complete at this time to fulfill
 20 the purpose of providing an assessment of damages "in light of the information
 21 currently available to [him] in sufficient detail so as to enable . . . Defendant[] . . . to
 22 understand the contours of its potential exposure and make informed decisions as
 23 to settlement and discovery." City & Cty. of San Francisco v. Tutor-Saliba Corp.,
 24 218 F.R.D. 219, 221 (N.D. Cal. 2003). For example, Plaintiff's disclosures state his
 25 future medical damages are based on his belief he will need future surgeries, pain
 26 management, and physical therapy. Okun Decl., Ex. A. Defendant argues
 27 Plaintiff's treating physician testified Plaintiff is not a candidate for future surgery.
 28 Mot. at 17. While the treating physician's testimony is strong evidence Plaintiff

1 will not incur future medical damages for future surgeries, it does not preclude
2 Plaintiff from offering expert testimony in support of his position.

3 Plaintiff's disclosures regarding wage loss are that Plaintiff believes he has
4 lost earning capacity and will therefore suffer future wage loss. Okun Decl., Ex. A.
5 Plaintiff's counsel states "there are no documents in Plaintiff's possession
6 supporting past wage loss, as Plaintiff has repeatedly informed Defendant, as
7 Plaintiff testified in deposition that Plaintiff had no work history prior to this
8 accident." Shaller Decl., ¶ 14. Plaintiff has hired a vocational expert who will
9 presumably provide information about jobs available to Plaintiff in the national
10 market and how Plaintiff's injuries may have affected those opportunities. *Id.* at ¶
11 18, 20-21. Defendant may depose Plaintiff's expert and/or hire its own rebuttal
12 expert. However, in light of the absence of Plaintiff's prior job history, it appears
13 any further calculation is properly within the province of expert testimony.

14 Plaintiff's disclosures regarding intangible damages state his general
15 damages request is based on "pain and suffering; physical disfigurement; physical
16 impairment; mental anguish; and lowered quality of life." Okun Decl., Ex. A.
17 Defendant argues Plaintiff's disclosures regarding intangible damages are
18 boilerplate and insufficient. Mot. at 20-21. However, intangible damages such as
19 pain and suffering, mental anguish, and lowered quality of life, are generally based
20 on a plaintiff's testimony. *See Estate of Gonzalez*, 2007 WL 3237635, at *4
21 (finding plaintiffs' disclosures regarding mental anguish and pain and suffering
22 were sufficient where plaintiffs identified the type of damages sought because their
23 losses would "be proved predominately (if not exclusively) through testimony they
24 offer regarding the emotional suffering they have experienced"). Defendant may
25 argue Plaintiff has not suffered \$700,000 worth of such damages, but more specific
26 analysis is not required by Rule 26(a)(1)(C). *Id.*

27 In its Objections, Defendant argues the supplemental disclosures are
28 deficient. However, Defendant provides no authority requiring specific itemization

1 of damages under the circumstances of this case. As set forth above, Plaintiff's
 2 supplemental disclosures do more than "merely set[] forth the figure demanded."
 3 Tutor-Saliba Corp., 218 F.R.D. at 221. Accordingly, under the circumstances of
 4 this case, the Court finds Plaintiff's supplemental disclosures are sufficient, in light
 5 of the information currently available to Plaintiff, to enable Defendant to
 6 understand the contours of its potential exposure.

7 Third, any insufficiency in Plaintiff's supplemental disclosures is harmless,
 8 particularly in light of upcoming expert report disclosures, lack of willfulness and
 9 availability of lesser sanctions. See R & R Sails, Inc., 673 F.3d at 1247 (considering
 10 willfulness and the availability of lesser sanctions when determining harmlessness
 11 under Rule 37(c)(1)). In its Objections, Defendant argues Plaintiff's delayed
 12 disclosures are not harmless because Defendant was prevented from asking
 13 Plaintiff questions at his deposition regarding damages sought. Dkt. 29, Obj. at 5
 14 (citing Mot. at 10-11). As an initial matter, it does not appear it was the delayed
 15 disclosures, but rather Plaintiff's lack of knowledge regarding his own damages that
 16 prevented Defendant from learning more about Plaintiff's claims at Plaintiff's
 17 deposition. Moreover, even assuming Plaintiff's delay is neither substantially
 18 justified nor harmless, the Court finds exclusion sanctions are unreasonably harsh
 19 at this time and Defendant has not shown the unavailability of lesser sanctions. See
 20 Bonzani, 2014 WL 66529, at *5.¹

21 Defendant also argues Plaintiff should be limited to damages of \$100,000 as
 22 set forth in his administrative claim less any award for past medical expenses. Mot.
 23 at 20-21; Reply at 5 (citing Salcedo-Albanes v. United States, 149 F. Supp. 2d 1240,
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25 ¹ As in Bonzani, while the sanction sought does not completely foreclose any relief
 26 on Plaintiff's claim, the sanction sought "effectively eviscerates" Plaintiff's claim
 27 by precluding consideration of over \$2.5 million in alleged damages. See id. at *5.
 28 Therefore, the Court is "required to consider whether the claimed noncompliance
 involved willfulness, fault, or bad faith, [citation], and also to consider the
 availability of lesser sanctions." Id.; see also R & R Sails, 673 F.3d at 1247
 (reaffirming the requirement of considering willfulness and lesser sanctions "when
 a district court conducts the harmlessness inquiry required under Rule 37(c)(1)").

1 1242 (S.D. Cal. 2001)). Defendant's purported motion *in limine* to limit Plaintiff's
 2 intangible damages may have merit, but it is not properly based on Rule 37(c) and
 3 has nothing to do with the specificity of Plaintiff's Rule 26 disclosures or discovery
 4 responses.

5 Finally, Defendant argues Plaintiff's failure to timely comply fully with the
 6 Court's June 14, 2016 Order regarding production of documents warrants
 7 precluding Plaintiff from providing any evidence of future damages at trial. Mot. at
 8 21-22. However, the only document Defendant has identified he believes Plaintiff
 9 has not yet produced is Plaintiff's MRI imaging.² *Id.* Defendant has not provided
 10 any authority requiring the Court to preclude a category of damages based on
 11 failure to produce a single document.³ Therefore, the Court declines to preclude
 12 entire categories of damages based on Plaintiff's alleged failure to produce a single
 13 document.

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19 IV.

20 RECOMMENDATION

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 23 ² The Court notes Plaintiff states he has produced all MRI images in his possession,
 24 custody, or control. See Okun Decl., Ex. C. However, it appears Plaintiff's expert
 25 relied on an MRI report that has not been provided to Defendant. Dkt. 29-1,
 Declaration of Justin A. Okun in support of Objections, ¶ 4, Ex. A.

26 ³ In its Objections, Defendant alludes to the possibility that the Court could
 27 "fashion another sanction for failure to provide the imaging." Dkt. 29, Obj. at 6,
 28 n.3. While it appears an appropriate sanction may be to preclude the use of the
 MRI imaging at trial, it is not clear Defendant is in fact seeking such a remedy. The
 Court declines to speculate as to what relief Defendant may be seeking. Hence, the
 Court would be willing to consider a properly filed motion for monetary sanctions.
 See Bonzani, 2014 WL 66529, at *5.

1 IT IS THEREFORE RECOMMENDED that the District Court issue an
2 order: (1) accepting the findings and recommendations in this Final Report; and (2)
3 DENYING Defendant's Motion without prejudice.

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5 Dated: August 17, 2016



6 HONORABLE KENLY KIYA KATO
7 United States Magistrate Judge
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